Citation: *Van Bibber v. Stockley*, 2005 YKSM 1 Date: 20050110
Docket: 04-S0019
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Chief Judge Lilles

Stuart Van Bibber

Plaintiff

v.

Gerry Stockley

Defendants

Appearances:
Anna Pugh — Articling Student appearing for the Plaintiff
Gerry Stockley — Appearing on his own behalf

REASONS FOR JUDGMENT

[1] The plaintiff, Stuart Van Bibber, is an acquaintance of the defendant, Gerry Stockley. Both are friends of Mike Kelly, and on two occasions in 2003, Mr. Kelly and Mr. Van Bibber with their “dirt bikes” and Mr. Stockley with his “four wheeler” ATV went on outings together. On the first occasion, they rode around on Mr. Stockley’s 220 acre property on the Mayo Road. On the second occasion, they took their vehicles to the Carcross desert.

[2] After each occasion, Mr. Van Bibber and Mr. Kelly left their dirt bikes in the defendant’s garage. This was done with the consent of the defendant, Mr. Stockley. There was no problem with this arrangement until, towards the end of the summer, Mr. Stockley’s wife needed space in the garage. By this time, Mr. Kelly had removed his bike but Mr. Van Bibber’s bike was still in the garage. Mr.

Stockley moved Mr. Van Bibber's bike out of the garage onto the yard. Mr. Stockley said that he did not know how to reach Mr. Van Bibber so he called Mr. Kelly and asked him to tell Mr. Van Bibber to pick up his bike from the yard. Mr. Kelly does not remember this telephone call, and did not pass on the message to Mr. Van Bibber.

[3] Shortly after moving Mr. Van Bibber's bike out of the garage into the yard, the plaintiff and his wife spent a long weekend in Dawson City. They do not remember seeing the dirt bike when they returned and assumed it had been picked up by Mr. Van Bibber.

[4] Mr. Stockley runs a "paint ball" business on his property. While he was in Dawson City, members of the public and his employees had access to his property and, as a result, to Mr. Van Bibber's dirt bike that was stored in the yard.

[5] In March of 2004, Mr. Van Bibber contacted Mr. Stockley about picking up his dirt bike and was advised by Mr. Stockley that it was missing and probably stolen. In June, Mr. Van Bibber initiated this action.

Was there a bailment of the bike?

[6] A bailment is defined as the delivery of possession of a chattel with a specific mandate which requires it to be returned or dealt with in a particular way by the bailee: See *Bata v. City Parking Canada Ltd* (1973), 2 O.R. (2d) 446 (C.A.). In *Robertson v. Stang*, [1997] B.C.J. No. 2022 (BCSC) the court held (at para. 60):

> Where personal property is left upon another's premises … the test is whether or not the person leaving the property has made such a delivery as to amount to a relinquishment, for the duration of the relation, of his exclusive possession, control, and dominion over the property, so that the person upon whose premises it is left can exclude, within the limits of the agreement, the possession of all others. If he

> has, the general rule is that the transaction is a bailment.

[7] There was clearly an understanding between the parties that the plaintiff could store his bike with the defendant. No time limit was set, because the parties did not advert to it. No doubt both parties contemplated “dirt biking” again in the future. Indeed, they did go out together for a second time in the summer.

[8] Although the defendant, Mr. Stockley, lived out of town on a large acreage consisting of 220 acres, it was clearly contemplated by the parties that the bike would be stored in the defendant’s garage which could be locked. On both occasions when they had finished biking, Mr. Van Bibber’s and Mr. Kelly’s bikes were placed in the garage. They were not left outside on the property. This was to keep them secure, as customers would attend his paint ball business on his premises. Mr. Kelly testified that he put his bike in the garage and he “assumed that the garage would be locked”.

[9] As the defendant had full control of the garage where the bike was stored, including the ability to lock it and exclude others, including the plaintiff, the requirements of the bailment are met.

[10] On the facts of the case at bar, I am satisfied that the defendant, Mr. Stockley, was a bailee of the dirt bike owned by the plaintiff, Mr. Van Bibber.

Onus of Proof

[11] In the first instance, the onus lies upon the plaintiff to establish that the transaction constituted a bailment. But as stated in 2 Hals (4th Ed.) at para. 1543 (cited in *Thievin v. Southmark Vancouver Corp*., [1990] B.C.J. No. 1606 (BCSC) at p. 3), the onus shifts to the custodian when the subject of the bailment is lost.

> Onus of Proof. When a chattel entrusted to a custodian is lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in the consequence of his neglect to use

> such care and diligence as a prudent or careful man would exercise in relation to his own property. If he succeeds in showing this, he is not bound to show how or when the loss of damage occurred. If a custodian declines either to produce the chattel entrusted to him, when required to do so by the owner, or to explain how it has disappeared, the refusal amounts prima facie to evidence of breach of duty on his part, and throws on him the onus of showing that he exercised due care in the custody of the chattel and in the selection of the servants employed by him in the warehousing.

[12] In the case at bar, Mr. Stockley is not able to explain what happened to Mr. Van Bibber's dirt bike except to surmise that it was stolen after he moved it out of the garage. The case law establishes that the bailee is not an insurer of the property entrusted to him, meaning his liability is not absolute. The defendant is not liable for the acts of independent third parties such as thieves, but it cannot rely on the defence of theft if it has failed to take to take reasonable care of the property: see *Manitoba Public Insurance Corporation v. Midway Chrysler Plymouth Ltd.*, [1978] 1 W.W.R. 722 (Man. C.A.).

[13] The question remains, what is the standard of care in the circumstances of this case, being analogous to a gratuitous bailment (meaning a bailment where no money is exchanged).

What is the standard of care?

[14] The law, as it relates to bailment, is set out in the recent case of *Gaudreau v. Belter* (2001), 290 A.R. 377 (Q.B.). In this case, the facts were straightforward. Gaudreau and Belter were on a golf vacation together. As Mr. Gaudreau was traveling on to meet his family to continue a family vacation, he gave his golf clubs to Belter who agreed to store them until Gaudreau returned to the Edmonton area. Belter stored the clubs in his garage, which was usually locked. On one occasion he left the garage door open and the clubs were stolen.

[15] Acton J. stated (at para. 7):

> A review of Canadian jurisprudence reveals that there is conflicting Canadian case law; some courts have held that a bailee will only be liable for gross negligence, and others have held that the standard of care for bailment, whether gratuitous or for reward, is the standard that is reasonable in the circumstances. The general trend, however, is to favour the latter.

[16] The court cited at para. 8, 2 Halsbury's Laws of England (4th ed) at p. 833:

> More recently, however, it has been recognized that the common law duty of every bailee is to take reasonable care of his bailor's goods, and not to convert them. The standard of care required is therefore the standard demanded by the circumstances of each particular case. To try to put a bailment into a watertight compartment, such as a gratuitous bailment or bailment for reward, can be misleading. It must be remembered, however, that bailment is frequently a contract, and the parties may always vary the incidents by the terms of the contract.

[17] The court concluded as follows (at para. 10 and 11):

> A test that focuses on what is reasonable in the circumstances is more flexible and more appropriate than trying to force facts into pigeon hole classifications, and more practical than trying to determine what category of fool a defendant comes within. The relevant circumstances will include whether the bailment was gratuitous or for reward, but will also include circumstances such as how the bailment came about, the relationship between the bailee and the bailor, the value and nature of the bailed item, and the cause of the damage or loss.
>
> Here, Judge Allford found that it was negligent to leave the golf clubs in the garage and leave the garage door open. In the circumstances, I agree. The reasonable prudent person would have kept valuable golf clubs in the garage with the door closed and locked. Mr. Belter, through inadvertence, did not do so, and he is liable for that negligence. The appeal is dismissed.

[18] The *Thieven* case, *supra*, articulated that standard of care as follows (at p. 4):

> It would appear that the learned author correctly understood Canadian case law. In 1921, our B.C. Court of Appeal in Brewer v. Calori (1921) 29 B.C.R. 457 found a hotel keeper who gratuitously agreed to look after the plaintiff's trunk in its baggage room was a mere gratuitous bailee and was only bound to exercise that degree of care which reasonably prudent men would exercise with respect to their own property of a like description. (emphasis mine)

Conclusion

[19] On the facts of this case, I find that the defendant, Mr. Stockley, did not exercise the standard of care required in the circumstances. A reasonable and prudent person would have stored Mr. Van Bibber's dirt bike in the garage which could be locked as required. This was clearly the expectation of Mr. Van Bibber acquiesced to by Mr. Stockley. Mr. Van Bibber's and Mr. Kelly's bikes were placed in the garage after each of the outings. Mr. Kelly stated that he would have been concerned if his bike was not in the garage where it could be secured.

[20] Mr. Stockley's position changed in August or September of 2003 when his wife required space in the garage. Mr. Stockley moved Mr. Van Bibber's bike out of the garage. Mr. Stockley was not certain where he moved it, but it was not in a location where he could keep an eye on it daily because he was not certain when it disappeared. Mr. Stockley did not attempt to contact Mr. Van Bibber directly to pick up his bike. Rather, he said he telephoned their mutual friend, Mr. Kelly, and told Mr. Kelly to tell Mr. Van Bibber to pick up his bike. Mr. Kelly does not recall this telephone call. In any event, he did not contact or pass on the message to Mr. Van Bibber. I am not persuaded on the evidence that Mr. Stockley did contact Mr. Kelly. Even if he did, Mr. Stockley would be responsible for Mr. Kelly's omissions as Mr. Kelly would be acting as his agent.

[21] I note that Mr. Stockley did not attempt to locate Mr. Van Bibber directly. Mr. Stockley did not look for his name in the telephone directory nor did he contact Mr. Van Bibber's parents. The evidence of Geraldine Van Bibber, the plaintiff's mother, was that Mr. Stockley had been present at her residence during the summer and knew where she lived. He did not ask Mr. Kelly for Mr. Van Bibber's address or telephone number.

[22] Mr. Van Bibber's dirt bike disappeared but Mr. Stockley is not sure when. It could have been stolen while he was away in Dawson City for a long weekend. Mr. Stockley was still operating his "paint ball" business, and both clients and his employees attended at the property while he was away. Leaving the plaintiff's dirt bike out on the property in these circumstances fell short of due care and attention.

[23] On the other hand, had Mr. Stockley contacted Mr. Van Bibber and given him a reasonable time period to remove this dirt bike from his garage, the result may have been different. If Mr. Van Bibber had not attended and removed his dirt bike, Mr. Stockley would have been entitled to move Mr. Van Bibber's dirt bike out of the garage. However, Mr. Stockley failed to provide any notice at all.

[24] In conclusion, the defendant failed in his duty to take reasonable care in all of the circumstances to ensure that the plaintiff's goods would be reasonably safe while stored on his premises. I order that Mr. Stockley reimburse Mr. Van Bibber for the value of the dirt bike.

[25] Mr. Van Bibber purchased his dirt bike on June 23, 2003 for $2,500.00. Mr. Kelly testified that this was a good price, as Mr. Van Bibber's bike was similar to his bike for which he paid $3,000.00. Although Mr. Van Bibber's bike was purchased second hand, I infer that there would be some depreciation. In absence of any evidence of the current value of the dirt bike, judgment will be for the plaintiff in the amount of $2,200.00. In the circumstances, Mr. Van Bibber will

also be entitled to be reimbursed for his court costs. Interest will be calculated on any amount outstanding at the end of the day on January 31, 2005 in accordance with the *Judicature Act*, retroactive to January 1, 2005.

LILLES C.J.T.C